UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

29th Street ALF, LLC d/b/a
Meadowview of Greeley,

Employer,

Case 27-RC-245022

and

United Food and Commercial Workers Union, Local 7,

Petitioner.

Petitioner's Brief in Opposition to Employer's Request for Review

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Petitioner United Food and Commercial Workers Union, Local 7 ("Local 7" or the "Union"), through its undersigned counsel, hereby submits the following Brief in Opposition to Employer's Request for Review, filed June 3, 2020. As noted below, and in Petitioner's Brief in Opposition to Employer's Exceptions to the Hearing Officer's Report and Petitioner's Post-Hearing Brief, there is no basis for the National Labor Relations Board (the "Board") to review or overturn either the factual findings or the legal conclusions of the Regional Director, as set forth in her Decision and Certification of Representation, dated May 20, 2020.[1] The RD's Decision is well supported both by the factual record and applicable law. Further, there is no basis for the Board to grant the Employer's request for extraordinary relief. The Board should therefore deny the Employer's Request for Review and request for a stay.

I. OVERVIEW

Just like its prior Exceptions Brief, the Employer's arguments are nothing more than a third, failed, attempt to fashion meritless mischaracterizations into a specious Objection to overturn the validly expressed desires of its employees – representation by the Union. The Employer rehashes – largely verbatim – the same factual inaccuracies and legal fallacies that were soundly rejected first by the Hearing Officer, and subsequently by the Regional Director. At no point in this saga has the Employer offered any *evidence* in support of its claims, and the Employer certainly has not offered any new or additional evidence or reason to review or overturn the prior determination based upon the very same, insufficient, evidence. The Employer simply wishes for a different result. That is not the "compelling" reason required by the law.

[1] References to prior filings herein are designated as follows: Employer's Request for Review ("Request"); Decision and Certification of Representative ("RD Decision"); Brief in Support of Exceptions to the Hearing Officer's Report on Objections ("Exceptions Brief"); Opposition to Employer's Exceptions to Hearing Officer's Report ("Exceptions Opposition"); Hearing Officer's Report on Objections ("HOR"); Petitioner's Post-Hearing Brief ("Petitioner's Post-Hearing Brief"); 29th Street ALF, LLC's Closing Argument Brief in Support of its Post-Elections Objections ("Employer's Post-Hearing Brief").

Although the Employer peppers its brief with sporadic references to the statutory bases for review by the Board, its abortive efforts end there. The Employer's brief is largely a recitation of its Exceptions Brief – even to the extent that it includes the same blatant inaccuracies and downright untruths called out by both Petitioner and the Regional Director. The Employer evidently spent little time fashioning its argument, and moreover, evidently cares so little that it did not even deign to be accurate – one such error may be an oversight, but repeating the same errors shows disregard for the truth. The few, fleeting homages to the standards of review sprinkled in among the same, soundly rejected factual and legal inaccuracies provide no basis for reviewing the decision of the Regional Director.

Moreover, beyond including the request itself, and one conclusory sentence, the Employer provides no support for its baseless request for extraordinary relief, which is nothing more than another transparent attempt by the Employer to inject further undue delay into this process.

II. LEGAL STANDARD

A Request for Review of a Regional Director's Decision, such as the instant one, will only be granted for "compelling reasons." 29 CFR § 102.67(d). Board Rules provide only four bases on which review may be granted – the Employer contends three such bases exist here: (1) departure from Board precedent; (2) the Regional Director erroneously decided a factual issue, which prejudiced a party; and (3) compelling policy reasons to reconsider the Board rule on the scope of supervisory conduct before a new election is warranted. Request at 4-5. *See also* 29 CFR § 102.67(d). But, the Employer has failed to establish that *any* of these reasons are actually present here.

The Employer's request for extraordinary relief fares no better. Under 29 CFR § 102.67(j), the Board will grant any of three forms of extraordinary relief *only* upon a *clear* showing that it is *necessary* under the circumstances. Far from meeting this standard, the Employer includes but one, conclusory sentence that such relief is *required* to avoid *undue prejudice*. Request at 3. The remaining pages of the Employer's brief make no reference at all to the request for extraordinary relief.

Not only has the Employer not raised any reason to review the RD Decision or provide extraordinary relief, but it also has provided no bases for overturning the election in the first instance. The Board adheres to the rule that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc*., 344 NLRB 252, 253 (2005) (citation omitted). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB 637, 637 (2014) (citation omitted). In order to meet its burden, the objecting party must show that the conduct in question affected employees in the voting unit. *See Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling objections where no evidence that employees knew of alleged coercive incident). As articulated *twice* by Petitioner, and thoroughly analyzed and confirmed by the Hearing Office and Regional Director, none of these showings are made in the instant record.

III. THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT ROBERT RAMIREZ WAS NOT A SUPERVISOR, AND THERE IS NO BASIS TO REVIEW THIS DETERMINATION

Under the Act, a "supervisor" is "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Sec. 2(11). Thus, as recognized by the Employer, to establish supervisory status, the moving party must show:

> 1) that the employee held authority to engage in any 1 of the 12 enumerated supervisory functions listed in Section 2(11); 2) that the exercise of the authority was not of a mere routine or clerical nature but required use of independent judgment; and 3) that the authority was held in the interest of the employer.

Request at 6 (citing *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006)).

Despite the Employer's regurgitation of its properly rejected contentions, the Employer failed to establish that Ramirez had the authority to engage in *any* of the twelve supervisory functions – or that Ramirez' exercise of supposed supervisory authority (or the exercise of any of his non-supervisory job functions) required the use of independent judgment. Thus, because the Regional Director correctly determined that Ramirez did not have the authority to engage in *any* of the enumerated supervisory functions (and therefore, inherently did not use any independent judgment in exercising such authority in the interest of the Employer), the Regional Director's determination that Ramirez was not a statutory supervisor fully complied with Board precedent. The Employer has offered no valid reason to review this determination.

a. The Employer failed to establish that Ramirez engaged in *any* enumerated supervisory functions.

The Employer's purported evidence of Ramirez' authority to engage in "numerous" supervisory functions (Request at 6) is nothing more than the same conclusory contentions properly dismissed by the Regional Director for that reason. *See* RD Decision at 3 ("the evidence identified by the Employer is conclusory - meaning it simply states the proposition rather than establishing how Ramirez exercised such authority using his independent judgement.").

The Employer argues that it considers the Maintenance Director position "part of the management team and 'leaders in the building'" (Request at 6) – but conveniently ignores Board law which delineates between a *statutory* supervisor and employees with *some* supervisory authority.[2] Similarly, the Employer ignores the Regional Director's admonition that "[i]n enacting Section 2(11) of the Act, Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives" and employees such as "straw bosses, leadmen, and set-up men, and other minor supervisory employees" who do not possess such authority." RD Decision at 3 (citation omitted).

What is more, the Employer itself has withheld supervisory authority from the Maintenance Director. The Employer blatantly ignores that *Ramirez' job description*, entered into evidence by the Employer, expressly states that the position does *not* have any supervisory requirements. *See* Employer Exs. 9, 10; *accord* Transcript at 56:5-10 (Bengston) (regarding Employer Ex. 10):

> Q And on the top of [Ramirez' job description] there's essentially a box that has job title and department and reports to. Do you see that?
>
> A Yes.
>
> Q And under supervisor requirements, what does it say?
>
> A It has the word no.[3]

[2] The Union has never disputed that Ramirez is a *supervisor. See* Petitioner's Post-Hearing Brief at 5; Exceptions Opposition at 16 n.4. However, not all supervisors are *statutory supervisors* – rather, it is "well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor." *Heritage Hall*, 333 NLRB 458, 458-59.

[3] Tellingly, the job description for the Life Enrichment Coordinator includes some of the key words for 2(11) supervisors – "direct supervision of all life enrichment personnel and chauffeurs to include hiring, training, coaching, staffing, scheduling, performance evaluations, advancement, and related supervisory duties . . .," *see* Employer Ex. 5, but all of this language is conspicuously *missing* from the job description for the Maintenance Director. *Compare* Employer Ex. 10.

Perhaps recognizing the paucity of its own evidence, the Employer again admonishes the Union for not presenting witnesses to *contradict* Ramirez' statutory authority. *See* Request at 7 n.3. This desperate attempt to camouflage the Employer's lack of supporting evidence would be laughable if it were not so tired – the objecting party, the Employer, has to the burden of establishing Ramirez *was* a supervisor. *E.g. Delta Brands, Inc.*, 344 NLRB 252, 253 (2005). The Employer's failure to meet its burden does not shift the onus to Petitioner to fill in the gaps through its direct or cross examination of remaining witnesses. And, it is beyond disingenuous to say that by not doing so, the "Union all but conceded Ramirez's supervisory status." Request at 7 n.3. The Union has *consistently* and *repeatedly* challenged Ramirez' supervisory status, but it is simply not the Union's job to elicit testimony to undermine an allegation that has not been proven, and for which it does not have the burden.

i. Ramirez has insufficient supervisory authority or discretion to discipline.

The Employer's strained attempt to argue Ramirez has any authority to discipline (*see* Request at 7) fails to establish he had any such authority, and moreover, fails to establish that the Regional Director's determination on this point warrants review. In fact, the Employer's own citation (Request at 7) to *Veolia Transportation*, 363 NLRB No. 188, slip op. at 6 (2016) – that disciplinary authority must lead to personnel action *without* involvement by other management personnel – undermines its argument. The Employer points to the handful of disciplinary forms signed by Ramirez *and the Residence Director* (Employer Ex. 15) and cites to Bengston's non-credible testimony that the Regional Director was included in the disciplinary meetings "only so they were aware of the discipline issued by Ramirez." Request at 7.

But, far from demonstrating Ramirez' independent authority, the documentary evidence makes clear that the *Residence Director* signed off on the 2017 and 2018 written coaching forms

the Employer introduced as supposed evidence of Ramirez' supervisory authority to discipline. *See* Employer Ex. 15. Thus, although Ramirez may have been *involved*, the Employer woefully failed to establish that he acted independently in this process, or even that he had *any* meaningful involvement at all. The Employer failed to adduce evidence demonstrating that Ramirez performed any function greater than the equivalent of a potted plant sitting in the corner.

Given the opportunity, the Employer did not elicit any testimony from Ramirez about his purported disciplinary authority, or whether it entailed any independent judgment. Thus, even if Bengston's nonsensical explanation were true, the disciplines, which "[o]n their face . . . appear to be the application of the Employer's established attendance policy" (RD Decision at 4) and nothing more, would not evidence any independent judgment by Ramirez, who was simply filling out forms (*none* of which were even from the relevant Summer 2019 time period) which effectuated pre-determined consequences.

ii. Ramirez had insufficient supervisory authority or discretion to assign work.

The Employer's contention that Ramirez' statutory supervisor status was evidenced by his ability to assign work (Request at 7-8) fares no better – like all of the Employer's purported evidence, it relies on conclusory allegations already rejected as such by the Regional Director, *see* RD Decision at 3-4, and the Employer offers no explanation for why review is warranted.

The Employer relies largely on the testimony of Bengston but notably failed to elicit any meaningful details from Ramirez, *the Company's own witness*, as to *how* he determined whether to grant time off, create schedules, or *how* he assigned or directed work. *Compare* Request at 7-8 *with* RD Decision at 3. Not only did the Employer have the opportunity to elicit testimony from Ramirez, but it also called Andrews, one of Ramirez' two direct supervisees at the relevant time period, to testify. At no point during her mere minutes-long testimony did the Employer solicit

any testimony to support its unfounded contention that Ramirez' authority to assign or direct her work was that of a statutory supervisor. Rather, when asked whether Ramirez directed or assigned her work, Andrews answered vaguely, without elaboration, "Yeah." Transcript at 224:2-3. Thus, the record is glaringly devoid of sufficient detail to understand Ramirez' true role and thus the Employer has provided no basis for reviewing the Regional Director's determination on this point.

Next, the Employer cites to Ramirez' approval of time off requests on "no less than four separate occasions" (Request at 7) as if this in any way could compensate for the complete dearth of statutory supervisory authority. These three employees likely took off more than the 1-2 days per employee entered into evidence, in particular since one of the requests dates back to 2017. *See* Employer Ex. 11. Thus, one might wonder who approved the remaining time off Ramirez' subordinates inevitably took. Not to mention, of course, that even if Ramirez did review all his supervisees' time off requests, no evidence was presented regarding the parameters he used in making such decisions, and thus whether it involved any discretion or independent judgment or was simply a rubber stamp. There was no evidence that he ever *rejected* a vacation request. In fact, it is patently false that, as the Employer claims, Ramirez alone had full authority to approve or deny time off requests during this time. Request at 7. To the contrary, when Ramirez' supervisee was asked whether Ramirez granted her time off requests, she explained "[i]t was like he was kind of more like a two, you know. We go through Robert, and then they go to the direct -- the main director." Transcript at 224:4-8 (Andrews). This fact was duly recognized by the Regional Director (RD Decision at 3) and the Employer has offered no evidence to undermine that determination or warrant review.

iii. Ramirez had insufficient supervisory authority or discretion to evaluate employee performance.

The Employer expends even less energy trying to salvage its unsupported argument that Ramirez' putative authority to evaluate employee performance evidences his statutory supervisory authority. *See* Request at 8. Because the Employer elicited no testimony on this point from either Ramirez or his testifying supervisee, Andrews, the Employer relies almost entirely on Employer Exhibit 14, which is a mélange of onboarding documentation, sign-in sheets, and 30- and 60-day evaluations filled out *by the employees themselves* that sporadically list Ramirez' name but include no meaningful information about his role with respect to *any* of the onboarding or training, or even the documentation. *See* RD Decision at 4 (Ramirez instructed to "observe" and did not "modify or tailor" trainings for particular employees, or evaluate or make recommendations based on the training); *id.* at 5 ("The evaluation forms do not include any input from Ramirez other than his signature and no evidence was presented concerning Ramirez's role in completing these forms.")

Thus, while Ramirez is listed as the Preceptor or Observer on documents from July 2018 (a full year before the petition was filed), there is no evidence that Ramirez acted with independent judgment or discretion with regard to this process. To the contrary, much of the documentation says that the *Residence Director*, chef, or other employees (*not* the Maintenance Director) will provide the training for the enumerated tasks. *See* Employer Ex. 14. Noticeably absent from the stack of papers is any input or evaluation *by Ramirez* – this is in sharp contrast to the evaluation forms introduced as Employer Ex. 6 which were the sole factor upon which the Hearing Officer concluded Wang-Murao *was* a statutory supervisor. HOR at 9.

Although the on-boarding forms included in Employer Ex. 14 (dating back to 2014 and noticeably not from summer 2019) list Ramirez as the employees' "supervisor," as articulated *supra*, a supervisor is not necessarily a *statutory* supervisor under the Act.

Simply put – saying that the documentation compiled into Employer Exhibit 14 "evidenc[es] Ramirez's responsibility to both onboard new employees and conduct ongoing performance evaluations" (Request at 8) does not make it so.

The infirmity of the Employer's argument on this is unsurprising – previously, the Employer mischaracterized Bengston's testimony concerning *different* evaluations completed by *Wang-Murao* to assert that "Ramirez was the Maintenance Director responsible for performing performance evaluations (24:7-8), which are directly tied to employee compensation (30:15-20)." Exceptions Brief at 7. This cited testimony, of course, says that the role of the *Life Enrichment Coordinator* (Wang-Murao's title) with respect to her supervisees included conducting performance evaluations (Transcript at 24:7-8) and that *those* evaluations (Employer Ex. 6) were tied to compensation. Transcript at 30:6-20. This has nothing to do with Ramirez. Thus, because the Regional Director correctly noted this mis-applied testimony (RD Decision at 5 n.4), the Employer was left with no "supporting" evidence. The Employer's ill-articulated replacement argument provides no basis for reviewing the RD Decision.

Finally and importantly, Ramirez' supposed authority to train and evaluate, like his supervisory status in general, is flatly contradicted by his job description, which states only that the Maintenance Director *"may provide input*" to the Residence Director on performance evaluations and training. *See* Employer Ex. 9, 10.

iv. Ramirez' purported secondary indicia of supervisory status cannot salvage his lack of statutory supervisory authority.

Even the Employer cites to Board law that establishes that secondary indicia may only serve as "background" for the question of supervisory status. Request at 8. The Employer does not argue this precedent is incorrect, or offer any reason why secondary indicia should justify finding Ramirez a supervisor here where the record is devoid of evidence of *primary* indicia. Thus, there is no reason to review the Regional Director's determination on this point. RD Decision at 5-6 (secondary indicia may be "valuable for background" but "establish, at most, that Ramirez was a senior employee trusted to engage in some minor supervisory responsibilities.").

The Employer's rote regurgitation of purported evidence of secondary indicia previously cited in its briefing – different evaluation criteria from associates, different PTO policy, potential attendance at one or two annual trainings, named as supervisor on offer letters – does nothing to undermine the soundness of the Regional Director's analysis on this point, which as just articulated, aligns with Board precedent, as recognized by the Employer's own brief.

Notably, as with its prior briefing, the Employer included Ramirez' purported participation in the hiring process among its discussion of the secondary indicia of his putative supervisory status. Request at 9. Of course, the authority to hire is one of the *primary* indicia of finding a statutory supervisor under the Act – thus, the Employer has essentially conceded that Ramirez' participation was not that of a supervisor acting with independent judgment. In any event, the purported evidence of hiring authority consists of a handful of offer letters (from well before the relevant period)[4] stating that if hired, the recipients would report to Ramirez. *See* Employer Ex. 12. However, all but one March *2016* letter came *from the Resident Director*, not

[4] Bengtson's repeated confirmations that these offer letters were "one small sample" of the offer letters identifying Ramirez as the relevant supervisor (Request at 9) is unavailing given the lack of evidence that he participated in the hiring decisions, or that as supervisor, he would have the authority and discretion of a *statutory* supervisor.

from Ramirez. *See id.*; Transcript at 57:23-58:2. There is no evidence Ramirez was actually even involved in these hiring decisions. *See* Transcript at 58:22-24 (Bengtson regarding Employer Ex. 12) ("Sir, there's nothing that says that - - who hired - - or who interviewed."). *See also infra*.

Finally, the Employer contends that the Board accords "some" significance to whether other employees regard the individual in question as a supervisor. Request at 9 (citing *Bama Co.*, 145 NLRB 1141, 1143 (1964)). The Employer then concludes this paragraph stating that it "overwhelmingly established Ramirez's authority to engage in supervisory functions" and that the "Regional Director's conclusion to the contrary must be reviewed as it is a departure from Board precedent and clearly in error in light of this factual record." Request at 10. This huge leap is entirely unsupported. First, the Employer recognizes that the Board gives *some* significance to the view of other employees – this does not undermine the Regional Director's conclusion that the overwhelming weight of the evidence does not establish that Ramirez was a supervisor. Secondary indicia cannot substitute for the lack of primary indicia, and even if it could, the Regional Director may properly find someone not a statutory supervisor after giving *some* significance to the perception of other employees, but ultimately finding other evidence to the contrary prevails.

That witnesses identified Ramirez as part of management, a department head, or a leader (Request at 9-10) is not dispositive of whether he was a *statutory* supervisor. *See supra.* Nor does the fact that he may have "occasionally" served as Manager on Duty (Request at 10) mean he is a statutory supervisor – notably, the enumerated responsibilities of the Manager on Duty (Employer Ex. 2) contain nothing related to any of the Section 2(11) functions. Finally it is an overstatement to say that Employer Exhibit 13 evidences that "at least one employee who reported to Ramirez throughout her employment also then submitted her resignation letter

directly to Ramirez in his capacity as Maintenance Director" which is evidence that employees viewed Ramirez as a supervisor, and therefore, he was a statutory supervisor. Request at 10. First, this is a string of assumptions. Second, Employer Exhibit 13 is from 2016, far before the relevant period. Third, while Ramirez signed the form, it includes no additional information to give context to his role in the employee's resignation or in any aspect of her employment – thus, this conclusory allegation falls into the same trap as the remainder of the Employer's brief, and provides no reason for review of the RD Decision.

b. Ramirez did not exercise independent judgment

The Employer failed to establish that Ramirez did much, if any, of the "supervisory" acts it claimed, let alone that he exercised independent judgment in doing so. Assuming, without conceding, that Ramirez may at times have used some discretion or independent judgment in running his department generally, this would not compensate for his dearth of authority to use his independent judgment to do the *specific actions* enumerated in Section 2(11) of the Act.

Even if it could, the Employer's pathetic attempt at articulating Ramirez' supposed use of independent judgment is nothing more than a jumble of testimony concerning *Wang-Murao's* job duties and mischaracterized testimony taken out of context, which must be disregarded.

First, despite being called out in the Exceptions Opposition, the Employer *again* contends that "undisputed testimonial evidence" proves that Ramirez was "expected to use discretion and independent judgment in running his department." Request at 10 (citing (22:16 – 23:1, 186:17-20, Employer Exh. 3, Employer Exh. 9). Of course, the testimony and documents have not since morphed into support for this contention.

Rather, the cited testimony states only that Exhibit 3 provides an accurate description of the *life enrichment coordinator position*, a job held at the relevant time by Wang-Murao (not Ramirez), Transcript at 22:16-23:1 (Bengston), and that Ramirez would be "*involved in* granting

time off requests if [certain employees] needed a change in schedule," Transcript at 186:17-20, *not* that he acted with discretion or independent judgment as the sole arbiter of who could change their schedule, let alone anything about the procedures dictating employee time off. While the Maintenance Director job description may reference use of discretion and independence, the enumerated job duties do not indicate this applies to his duties with respect to department personnel, and certainly not with respect to any Section 2(11) functions. In fact, the only reference in the job description to department personnel directs that the Maintenance Director should direct their work "according to LSL standards[5]" and may "provide input to the RD on performance evaluations and training." Employer Ex. 9. Far from acting with discretion and independent judgment with respect to his supervisees, this suggests Ramirez followed pre-determined standards and at most *assisted* the Regional Director on performance evaluations and training. *See also supra*. Of course, the job description also *expressly* says that the Maintenance Director has *no* supervisory requirements. Employer Exs. 9, 10; *see also supra*.

Even more preposterous is the Employer's repeated contention that "[s]everal witnesses also testified that Ramirez was responsible for performance evaluations." Request at 10-11 (citing 24:7-8 and 169:6-7). Rather, both of these "several" witnesses, Bengston and Oswald, testified *only* that *Wang-Murao* was involved in performance evaluations. *See* Transcript at 24:7-8 (Bengston), Transcript at 169:6-7 (Oswald). Either the Employer has not read the Transcript (or the Petitioner's briefing pointing out this fabrication), or is hoping the Board will not do so.

Finally, the Employer's ultimate contention – that Ramirez testified to doing his "own hiring" is taken completely out of context. Request at 11 (citing 185:20-23). As discussed *supra*, Ramirez did not use independent judgment or discretion in making hiring decisions. What

[5] LSL standards for Legend Senior Living, the parent company of the Employer.

Ramirez actually said in the Employer's cited testimony was that with the *previous* director (before the relevant time period) "I actually did more of hiring for – I did my own hiring," Transcript at 185:22-23, but during the relevant time period, with the *new* resident director, "[t]hey kind of control more of that." Transcript at 185:20-21. Indeed, Ramirez elaborated further – "But with the new one, I didn't really have a say, they just kind of pulled people in for interviews." Transcript at 185:25-186:1. *See also* RD Decision at 5 ("Ramirez's testimony establishes that at the time of the organizing campaign, his input (concerning hiring) was reduced from what it had been under prior Residence Directors.").

Additionally, when asked whether he advertised for the open position in his department, Ramirez testified that the "*community* does, like some sort of online sort of thing." Transcript at 185:13-16 (emphasis added). These are not the words of a man intimately involved in the hiring process, let alone one using his discretion and independent judgment to make hiring decisions.

Contrary to the Employer's misplaced desires, the fact that Ramirez testified to looking through applications, setting up a first interview, and conducting a second interview *with the Resident Director*, Request at 11, does nothing to establish he had the authority to hire, let alone act *independently* in any such decision. *See* RD Decision at 5. Rather, it establishes only that at one point in his nearly decade-long tenure at the Employer, Ramirez was involved in some peripheral way in the hiring process.

Far from being "uncontradicted evidence" of Ramirez' "ongoing exercise of independent judgment in his role as a supervisor," this evidence both contradicts itself and squarely fails to establish any authority, let alone independent authority, *by Ramirez*. Adopting the Hearing Officer's Report, the Regional Director explained quite clearly that "the evidence identified by the Employer is conclusory - meaning it simply states the proposition rather than establishing

how Ramirez exercised such authority using his independent judgement." RD Decision at 3. As aptly noted by the Regional Director, prevailing law dictates that, as the objecting party, the employer has the burden here to establish supervisory status, RD Decision a 3 (citing *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 711 (2001)), and "[p]urely conclusory evidence does not satisfy that burden . . ." RD Decision at 3 (citing *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) and *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). The Employer has not challenged the soundness of this authority, or explained why the application to the facts here was erroneous. There is no basis to grant review.

c. Ramirez did not exercise authority *as a statutory supervisor* in the interest of the Employer

Because the Employer woefully failed to establish that Ramirez was a statutory supervisor, or that he used discretion or independent judgment in performing any supervisory duties, it is immaterial whether he acted in the interest of the Employer. That Ramirez may have acted in the interests of the Employer while performing his actual job does nothing to salvage the Employer's Objection here – any acts were not those of a statutory supervisor.

IV. THE REGIONAL DIRECTOR CORRECTLY RULED THAT RAMIREZ AND WANG-MURAO DID NOT ENGAGE IN IMPROPER ONGOING PRO-UNION CONDUCT OR TAINT THE ELECTION, AND THERE IS NO BASIS TO REVIEW THIS DETERMINATION

First and foremost, the Employer *again* ignores binding Board law which extinguishes its Objection in its entirety. It is well-settled that with very limited exception not applicable here, election objections are limited to activity that is alleged to have occurred during the "critical period" between the petition filing date and the election date. *See Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). Thus, *none* of the purported misconduct alleged by the Employer – attendance at union meetings, any statements made at such meetings, discussions with employees about said meetings, and signing authorization cards – can properly be subject to objection

because it all occurred prior to the filing of the petition. This, of course, was recognized by the Regional Director, *see* RD Decision at 6-7, and the Employer does not even attempt to argue against this binding law or the Regional Director's application of it. Rather, the Employer simply pretends this controlling authority does not exist. Thus, the Employer provided *no* argument that review of Regional Director's determination on this point warrants review. That should end the inquiry in its starting blocks.

However, despite agreeing with the Hearing Officer that the Objection should be "overruled on the basis that it relies on evidence of pro-union supervisory activity that predates the critical period," RD Decision at 6-7[6], the Regional Director went on, "for argument's sake," to undertake a thorough analysis of the Employer's contentions under the two-prong test outlined in *Harborside*, which only *further confirmed* that the Objection had no merit. RD Decision at 7-10. Accordingly, the soundness of this analysis will be addressed in turn, even though it does not impact the overall determination by the Regional Director, and even though the Employer's conclusory contention that the Regional Director improperly applied the *Harborside* test, Request at 11, supported only by the same, insufficient evidence fails to articulate a basis for review. Notwithstanding, as articulated by the Board in *Harborside*:

> When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.
>
> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

[6] And that the Objection should be overruled to the extent it relies on conduct by Ramirez, who is not a statutory supervisor. RD Decision at 7.

> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside Healthcare, Inc., 343 NLRB 906 (2004).

a. The nature and degree of Ramirez and Wang-Murao's supervisory authority does not support finding any conduct interfered with employees' free choice in the election.

First, of course, Ramirez was not a statutory supervisor, and the Employer has provided no sound basis for review of this determination. *See supra*. Thus, it is not necessary to analyze his conduct under *Harborside*. *See* RD Decision at 7.

Second, even with respect to Wang-Murao's conduct, the Employer's reliance on *Harborside* is misplaced because *Harborside* addresses the potential impact of *pro-union* activity on an election. As articulated more fully below and in Petitioner's Post-Hearing Brief and Exceptions Opposition, *both* Ramirez' and Wang-Murao's extremely limited union-activity was *not pro-union* activity. Rather, the only connection between Ramirez and Wang-Murao and the Union is that each signed an authorization card (*see* Union Ex. 5) and attended two meetings prior to the filing of the petition in order to *gather information*. *See* Union Ex. 1 and 2; Transcript 83:2-3, 120:4-6, 21-23, 149:17-19 (Wang-Murao), *id*. at 193:8-10, 193:25-194:1, 198:11, 214:5-7 (Ramirez). The evidence demonstrates that at best, Wang-Murao was *hesitant* about the Union from the beginning, Transcript at 336:1-337:16 (Wang-Murao), and Ramirez was in fact *opposed* to the Union. Transcript at 213:13 (Ramirez). There is simply *no* evidence that either ever voiced or demonstrated that they were *in favor* of the Union.

But, even if they had, not all pro-union support is objectionable. *Harborside Healthcare, Inc*., 343 NLRB 906, 911 (2004) ("[W]e are by no means suggesting that supervisory prounion

speech, without more, is objectionable."); *accord SNE* Enterprises, 248 NLRB 1041, 1041 (2006) (emphasis added) ("After the petition was filed, the three leads continued to publicly support the Union, making comments that we find ***nonobjectionable***."). The Regional Director correctly cited Board law in this regard, writing: "The Board recognizes that under section 8(c) of the Act, employers and their agents are permitted to state their opinions on unionization, so long as those opinions do not rise to a level that could be perceived as threatening employees' working conditions or continued employment should they fail to vote in a manner consistent with the supervisor or employer's stated beliefs about unionization." (citations omitted). The Employer has provided no argument that this law is incorrect, was improperly applied, or should be re-examined – rather, the Employer essentially pretends that any limited, tangential Union activity is impermissible under the law.

Grasping at straws, the Employer attempts to make a mountain out of a molehill based on the two pre-petition meetings attended by Ramirez and Wang-Murao. Yet, the record is clear that neither took an active role at either meeting, let alone said anything in support of the Union. *See* Transcript at 195:17-18 (Ramirez) (I "wasn't really involved with the talking at all."); *id.* at 192:13-14 (Ramirez) (I was "hiding in the back."); *id.* at 195:18 (Ramirez) (I was "just sitting back and listening,"); Transcript at 161:18-22 (Oswald) (describing Wang-Murao and Ramirez as "just sitting and listening" not asking any questions); Transcript at 175:10-12 (Oswald) (Wang-Murao did not get up at the meeting and say she was a strong union supporter); *cf.* Transcript at 165:8 (Oswald) (unable to recall any statements Wang-Murao made at the union meeting both attended); Transcript at 235:20-21 (Andrews) (does not recall Ramirez making any statements at the union meeting they both attended); Transcript at 252:7-8 (Tiffey) (neither took an active role at either meeting they attended); *accord id.* at 242:2-3 (Tiffey); Transcript at

314:14-16 (Donatello) (regarding the July 11 meeting, Wang-Murao and Ramirez "just came and listened. They didn't really say a whole lot."); Transcript at 315:1-3 (Donatello) (regarding the July 16 meeting, neither Wang-Murao or Ramirez indicated any support for the Union).

It is undisputed that the Board found problematic *certain* conduct of statutory supervisors in *Harborside* and *SNE Enterprises*. But, that does not mean that failure to find objectionable the conduct alleged *here* is an erroneous application of the law. Proper application of controlling precedent does mean finding the same result. Every case rises and falls on its own facts and *Harborside* is fully distinguishable – it is entirely disingenuous to say "all of these factors [in *Harborside*] are also present in the current matter." Request at 12.

- Here, out of approximately 37 eligible voters (Board Ex. 1(b)) only five individuals were directly supervised by either Ramirez or Wang-Murao.[7] In contrast, the supervisor in *Harborside* supervised an entire wing, 343 NLRB at 911, a larger portion of the potential voting population.
- Unlike in *Harborside*, Ramirez and Wang-Murao did *not* have "the authority to initiate disciplinary action, direct employees, assign employees' schedules, give principal input on employee evaluations (which affected retention and pay raises), immediately suspend and send home employees, and recommend suspension and termination of employees." Request at 12. As articulated *supra*, Ramirez did not possess the authority to do *any* of the Section 2(11) supervisory functions. Wang-Murao, in turn, was found to be a statutory supervisor *solely* based on her authority to prepare annual performance

[7] As noted *supra*, the Union never disputed that, during the relevant period, Wang-Murao supervised Nuanez, Oswald, and Lara, or that Ramirez supervised Andrews and Quintana. This does not change the Union's position with regard to *statutory* supervisor status. *See Heritage Hall*, 333 NLRB 458, 458-59 ("It is well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor.")

evaluations for her three supervisees, which were directly tied to their wages. HOR at 13; RD Decision at 7. The fact that the Employer regurgitates the same fabrications does not make them true, and certainly does not raise an issue warranting review of the Regional Director's decision. *See* RD Decision at 7 (disagreeing with the Employer's contention that Wang-Murao and Ramirez "wielded the full panoply of supervisory authority.").

- There is little, if any, evidence that any employee in the voting unit reasonably perceived either Ramirez or Wang-Murao to be a "supervisor with substantial authority." Request at 12. Rather, even Wang-Murao expressed doubts as to the scope of her authority. *E.g.*, Transcript at 77:25-78:1 (Wang-Murao) (regarding separations: "I would say I probably would be in the process of it. I don't know to what extent - -"). And, while Ramirez thought himself to be a "leader" to his supervisees and the community (Transcript at 188:14-16, 193:19, 194:7-8, 202:22-23), it was not established that other employees, let alone his two supervisees, thought he had "substantial authority" to impact their working conditions. In fact, when Ramirez testified that he thought he was acknowledged by Nuanez at a union meeting as a "leader" he specified "not necessarily management, but like a leader in the community," Transcript at 193:17-20, because he *knew* everybody, Transcript at 194:7-8, not because he had *authority* over them. More important, of course, is that Ramirez' sole testifying supervisee was unequivocal when she testified that she did *not* have the impression Ramirez was a union supporter, Transcript at 234:18-20 (Andrews), so certainly did not experience any pressure from Ramirez to do the same.

Perhaps in recognition that Ramirez and Wang-Murao lacked virtually any relevant authority, the Employer does an about face from trying to portray Ramirez and Wang-Murao as department heads with authority they could levy to the detriment of their supervisees who did not

follow their lead in supporting the union – to trying to paint the picture that Ramirez' and Wang-Murao's departments were like tight-knit families, and thus the supervisees would blindly follow their leaders like sheep. Request at 13. However, the Regional Director found that "whether a supervisor is friendly with employees is not a factor that would establish objectionable conduct." RD Decision at 7. The Employer has provided no factual or legal basis for reviewing this determination. Further, regardless of the potential close relationships, the Regional Director went further and found "there is no evidence that any employee supervised by Wang-Murao were pressured to support the Union." RD Decision at 7. And, even aside from the fact that Ramirez was not a statutory supervisor, whether he may have been well known in the community based on his tenure at the Employer, "knowing everyone is quite different from having power over their terms and conditions of employment." RD Decision at 8.

There is no basis for reviewing the Regional Director's determination where each of Ramirez' and Wang-Murao's testifying supervisees made clear that they made up their own minds, and none testified to feeling any pressure from their supervisor to vote in favor of the Union. *See* Transcript at 175:19-23 (Oswald) (made up my own mind), 176:3 (Oswald) (Wang-Murao "didn't tell me how to vote."); *cf.* Transcript at 234:24-25 (Andrews) (Ramirez never told Andrews how to vote); *accord* Transcript at 213:5-9 (Ramirez) (I never told Andrews or Quintana how to vote); *cf.* Transcript at 140:23-141:2 (Wang-Murao) (Oswald and Lara can make decisions for themselves); Transcript 285:13-15 (Nuanez) (everyone made their own decision how they would vote if they voted).

Thus, given the lack of evidence of any formal statutory authority, or any "informal" influence, the Employer's implication that either Ramirez or Wang-Murao would have any undue persuasive authority over the voting unit, Request at 13, is unavailing, and downright

untrue. Moreover, is it a farce to even suggest, as the Employer attempts to do, that Ramirez' and Wang-Murao's conduct amounted to "implicit threats or coercion" (akin to that identified in *Harborside*) to drive employees to vote for the Union. *See* Request at 13.

Contrary to the Employer's allegations, the Regional Director did not ignore *Harborside* – rather, applying *Harborside*, the Regional Director found the level of formal and informal supervisory authority and alleged conduct not remotely comparable to that in *Harborside*, and therefore, not objectionable. RD Decision at 9 ("While the standard of evaluation from *Harborside* is applicable in this matter, the facts in *Harborside* are far different from those present here."); *see generally* RD Decision at 7-10 (applying *Harborside* test). In fact, the Regional Director went on to examine and affirm the Hearing Officer's analysis that the purported conduct in support of the Union here is "far less significant than the activity of managers in *Northeast Iowa Telephone Co*., 346 NLRB 465 (2006), where the Board concluded in a close election that 'the conduct of the managers does not approach the extensive and intimidating pro-union conduct engaged in by the high-level supervisor in *Harborside*,'" therefore finding it unobjectionable. RD Decision at 9. The Employer has provided no reason to review this sound and thorough analysis by the Regional Director beyond the fact that it did not like the result – but, the Regional Director's disagreement with the Employer's mischaracterization and aggrandizements does not mean they were not considered, and soundly rejected in accordance with controlling law.

Further, also in line with Board law, here, unlike in *SNE Enterprises*, there is *no* evidence that either Ramirez or Wang-Murao "specifically directed their pro-union activities toward those employees they directly supervised," Request at 14 – even assuming, without agreeing, that there was any pro-union activity. In fact, even the Employer acknowledges the Board's concern in

SNE Enterprises was that the front-line supervisors *directed* their *solicitation of authorization cards* towards their *subordinates*. Request at 14. Here, of course, it is indisputable that neither Ramirez nor Wang-Murao solicited or distributed *any* authorization cards – or other Union materials – from or to their subordinates, or otherwise. *See* Transcript at 128:8-13, 129:13-21 (Wang-Murao) (I did not give anyone an authorization card to sign); Transcript at 213:16-23 (Ramirez) (I did not distribute authorization cards); *accord* Transcript at 284:5-10 (Naunez) (never saw Wang-Murao distribute or receive an authorization card); Transcript 249:4-9 (Tiffey) (did not give Ramirez or Wang-Murao any authorization cards or Union buttons to distribute). The Regional Director correctly recognized this. RD Decision at 8 n.7.

The Employer's supposed support for this meritless contention is essentially that Wang-Murao shared her frustrations at a meeting, members of her team knew she signed an authorization card, and that Ramirez signed an authorization card at a meeting. Request at 15. None of this, of course, is conduct specifically *directed at* supervisees, and also, much of it is contradicted by the record.

While Wang-Murao may have shared frustrations at a union-held meeting, she described them as "personal" issues related to being "very poorly mistreated" by her previous supervisor. Transcript at 93:21-23 (Wang-Murao). The record does not indicate *who* may have heard Wang-Murao share her frustrations, and of course, venting about *personal* frustrations is not necessarily saying anything supportive of the Union. Further, Wang-Murao could not recall making statements in front of the larger group at the second meeting, describing the experience as "more of just, like, finding answers for my own so I can make a decision for myself." *See* Transcript at 104:20-105:3 (Wang-Murao).

And, while Oswald (one of Wang-Murao's supervisees) may have signed a card in part because she knew Wang-Murao signed a card, Transcript at 181:9-11, she was also abundantly clear in stating that Wang-Murao did *not pressure* her to support the Union. *See* Transcript at 178:16-19 (Oswald) (emphasis added) (Wang-Murao said it "*might* be good for [me] to attend the meeting, get some information and make up [my] *own mind*."); Transcript at 164:4-6 (Oswald) (emphasis added) (Wang-Murao said regarding attending a Union meeting, "there was a lot of good information, and that information might be important to me, as far as *deciding* whether or not *I* would be *for or against* the Union."); Transcript at 176:3 (Oswald) (Wang-Murao "didn't tell me how to vote."); Transcript at 175:19-23 (Oswald) (I made up my own mind). And, while Wang-Murao testified she *might* have told Oswald and/or Lara she *herself* signed authorization card, Transcript at 129:4-9, neither Oswald, Lara, or anyone else asked her whether *they* should sign their cards. Transcript at 129:10-12. There is simply *no* evidence that Wang-Murao pressured anyone else to sign an authorization, or support the Union in any way.

Finally, most ridiculous of course is the contention that Ramirez signed his authorization card at a meeting – a notion which is contradicted by all of the credited evidence, as correctly acknowledged by the Regional Director. RD Decision at 8 n.7. Really, this is almost immaterial, as even if Ramirez signed his card at a meeting (he didn't), there is no evidence that anyone else, let alone one of his supervisees, witnessed this, or that it was done (though of course, it was not done) in an effort to influence other employees to follow suit. Rather, when prompted by Employer's counsel, Ramirez agreed that "others could *potentially* see" that he signed a card, Transcript at 199:3-5, but he also testified that at the meetings, he was "hiding in the back," Transcript at 192:13-14 (Ramirez), and "wasn't really involved with the talking at all." Transcript at 195:17-18 (Ramirez).

Thus, the Employer's contention that Ramirez acknowledged he signed his card at a Union meeting in front of around 25 people "each of whom he had personally come to know over his near decade of employment with MeadowView," Request at 15, is disingenuous at best. First, as articulated *supra*, the credited evidence makes plain that Ramirez did *not* sign his card at a meeting. *See* RD Decision at 8 n.7. Second, even if he did, there is no evidence that anyone witnessed this, just that approximately 10-20 people signed into the same Union meetings attended by Ramirez, *see* Union Ex. 1, and, when prompted by Employer's counsel, Ramirez agreed that others could "potentially" have seen him sign. Transcript at 199:3-5. There is also no evidence that Ramirez personally knew everyone who attended the Union meeting with him – but also the Employer does not explain why that would matter. The Employer also re-iterates its fabrication that Wang-Murao "confirmed her recollection that Ramirez signed his authorization card at one of the union meetings." Request at 15 (citing 105:17-19). But, as noted by the Regional Director, what Wang-Murao *actually* said was that she could not recall, and she did not know if Ramirez took it home to sign. RD Decision at 8 n.7. The Employer did not even bother to correct this mischaracterization raised by the Regional Director, and certainly has not explained why it was in error.

Ramirez also said that everyone knew he signed a card, Transcript at 202:10, but provided no verifiable basis for this belief. Although initially he testified that there "was talk of me signing the card," Transcript at 202:7, moments later said he could not recall any conversations about the fact that he signed a card. Transcript at 203:10-13. Ramirez did not specify anyone who *knew* he signed a card, and the record contains no other mention of discussions surrounding Ramirez' authorization card (except to the extent the card was delivered to the Union).

The documentary evidence – which does not suffer from memory loss – is the best evidence here. Thus, it is clear that Ramirez signed his card on June 26, 2019, *before* attending any Union meetings. See Union Ex. 5 (authorization cards); Transcript at 193:8-10 (Ramirez) (attended two meetings); Union Ex. 1 (Ramirez is included on sign-in sheets for July 11 and 16 union meetings); *compare* Union Ex. 2 (Ramirez is *not* included on sign-in sheets for July 17, 23, and August 1 union meetings). The Regional Director properly credited this evidence and discredited Ramirez' testimony otherwise. RD Decision at 8 n.7.

Grasping at straws given that the Employer's only "evidence" of union involvement (let alone support) was signing authorization cards weeks before the election and attending two informational meetings before the petition was filed, the Employer next fabricates that Ramirez and Wang-Murao "actively encouraged their subordinates" to attend meetings. Request at 15 (emphasis in the original). This is not true, and is not supported by evidence in the record.

Two of Wang-Murao's subordinates testified – Oswald and Nuanez. Oswald testified numerous times that Wang-Murao suggested Oswald *may* want to attend a meeting to gather information to make her own, informed decision on the Union. *See supra.* Oswald did ultimately attend a meeting to "gather[] information." *Id.* at 179:8-9 (Oswald). After listening to the Union, Oswald conceded that "some good points" were brought up, but she had *not* yet made up *her* mind. Transcript 159:18-19. Oswald was unaware of anyone who attended a meeting because of influence or pressure from Wang-Murao or Ramirez. Transcript at 162:13-18 (Oswald).

And, far from being pressured by Wang-Murao, it was her other testifying supervisee – Nuanez – who invited Wang-Murao to attend the Union meetings, not the other way around. Transcript at 82:22-83:9, 84:11-17 (Wang-Murao); *id.* at 284:25-285:5 (Nuanez). Nuanez also

testified that everyone made their own decision whether to attend a meeting. Transcript at 285:10-12.

Nor did any of Ramirez' supervisees report feeling *any* pressure to attend union meetings. Ramirez' "affidavit" (Employer Ex. 18) – prepared by Employer's counsel (Transcript at 210:23-24 (Ramirez)) and then read into the record by the Employer's counsel (Transcript at 205:7-208:4) – does not establish otherwise. That Ramirez may have conveyed he was "open to" the Union and would "report back" to his supervisees who "trusted [him] to attend the meeting on their behalf" (Request at 16 (regarding Employer Ex. 18)) in no way establishes *support* for the Union, let alone encouragement that his supervisees attend meetings (since they purportedly trusted Ramirez to attend of their behalf). Moreover, Ramirez' supervisees *did* attend meetings (*see* Union Exs. 1 and 2), and so it is clear that Employer Exhibit 18, again based upon Ramirez' fallible recollection, is not accurate.

Nor, of course, does Ramirez' purported discussion with supervisees after the meeting (Request at 17) convey any attempt to influence, let alone any attempt to influence in favor of the Union. In fact, given that Ramirez unabashedly testified that he was *not* a Union supporter (Transcript at 213:13) and that his sole testifying supervisee concurred this was her impression (Transcript at 234:18-20) (Andrews) – it cannot fairly be argued that Ramirez actively encouraged his subordinates to attend meetings, or support the Union in any way. Indeed, Ramirez told employees the Union would not be a good thing for them, Transcript at 217:1-218:4 (Ramirez), and even told at least one employee to vote *against* the Union. Transcript at 217:17-23 (Ramirez); Transcript at 305:21-306:4 (Rangel).[8]

[8] That Ramirez may have *believed* his supervisees would follow his lead or be persuaded by his conduct (Request at 16; Employer Ex. 18) does not establish that either of his supervisees were in fact improperly influenced in making

Although this meagre evidence fails to establish that Wang-Murao or Ramirez improperly influenced their own subordinates, the Employer nonetheless leapfrogs to an even more conclusory, unsupported allegation, writing that "[t]t cannot be seriously maintained that Wang-Murao and Ramirez's conduct had no similar influence on innumerous other employees in the voting unit." Request at 16. Although the Employer appears to have submitted its brief (and its Exceptions Brief with the verbatim contention) with a straight face, this cannot stand. The Employer criticizes the Regional Director for "improperly minimiz[ing] the full scope of the misconduct at issue" but fails to explain, or provide any controlling authority, suggesting there was *any* misconduct, let alone that Ramirez' and Wang-Murao's *conduct* was not given due consideration by the Regional Director. This is woefully insufficient to warrant review.

Finally, almost in passing, the Employer "pays homage" to the standard for review by alleging that "important policy considerations require review of this decision." Request at 16. Nowhere does the Employer mention *what* policy considerations are implicated, or *why* they require review of the RD Decision.

b. Ramirez' and Wang-Murao's conduct did not materially affect the outcome of the election.

Given that there was no *pro-union* conduct, and that any conduct by Wang-Murao and Ramirez[9] did not interfere with the employees' exercise of free choice in the election – and also occurred outside the critical period – it could not have materially affected the outcome of the election. As with its entire brief, the Employer provides no reason to review the Regional Director's determination on this point, but specific infirmities of its contentions will nonetheless be addressed in turn.

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their own choice about the Union. Of course, if they were influenced by Ramirez, it would have been to vote *against*, not in favor of, the Union.

[9] Ramirez of course also was not a statutory supervisor. *See supra*.

i. The close margin of victory does not indicate that the purported pro-union conduct materially affected the election (Factor 1)

The margin of victory is immaterial where *no supervisory misconduct* was established, let alone misconduct that influenced anyone's vote. And, as articulated in Petitioner's Post-Hearing Brief (at 31), if anything, support for the Union waned as the election approached. Whether this is attributable to Ramirez or Wang-Murao, and their decision to *not* to engage in Union activity is, of course, unknown, but it certainly does not support a finding that either's influence tilted the election in *favor* of the Union. The prospect that at least Ramirez' conduct in fact tilted the election, if at all, *against* the Union is far more likely given that he and other witnesses testified that Ramirez was *not* a Union supporter (Transcript at 213:13 (Ramirez); Transcript at 234:18-20 (Andrews)) and had in fact told people to vote *against* the Union. Transcript at 17:17-23 (Ramirez); Transcript at 305:21-306:4 (Rangel).

While of course the Union does not dispute that the margin of victory was close, the Employer cannot even muster actual evidence that any *single* vote was impacted by the purportedly improper conduct of either Ramirez or Wang-Murao. Rather, the Employer breathlessly contends that both Ramirez' and Wang-Murao's "implicit coercive and influential pro-Union conduct directly affected" the two and three employees they supervised, respectively. Request at 17 (citing Transcript at 25:6-12, and 76:17 – 77:2, 154:8-11, and 185:1-9). At this point, it should come as no surprise that the testimony cited by the Employer purportedly in support of its baseless contentions does not say what the Employer claims – even after the mischaracterizations were called out by Petitioner in its Exceptions Opposition. But, the Employer stubbornly marches on, repeating its mischaracterizations verbatim, hardly bothering to reference the controlling legal standard for review or extraordinarily relief, and most certainly not providing any bases for granting either. This is no exception.

If one reads the Transcript, it is self-evident that the cited passages only contain testimony naming the individuals in each department. *See* Transcript at 25:6-12, and 76:17 – 77:2, 154:8-11, and 185:1-9. The Union does not contest that both Ramirez and Wang-Murao led departments at Meadowview during the relevant period, and as such, directly supervised two and three employees in the voting unit, respectively. *See* Petitioner's Post-Hearing Brief at 5. This does not, however, make either a *statutory* supervisor under the Act (*see supra*), and moreover, mere supervision does not establish anyone was *affected* (let alone *materially* affected) by their supervisor's conduct – improper, coercive, or otherwise.

Among these supervisees, the Employer identifies Oswald whose "testimony alone establishes the influence over a single voter that could have altered the outcome of the entire election." Request at 18. To the contrary, the Regional Director correctly found that "there is no evidence that any employee supervised by Wang-Murao were pressured to support the Union." RD Decision at 7. Oswald may have attended a meeting to *gather information* (Transcript at 179:8-9) after speaking with Wang-Murao. But, Wang-Murao herself expressed reservations and only suggested Oswald *may* want to attend a meeting to make up her *own mind* (Transcript at 164:4-6, 178:16-19). Thus, Oswald did just that – she made up her *own* mind. Transcript at 173:15-16. There is no scintilla of evidence that Wang-Murao improperly influenced Oswald to vote in favor of the Union, or evidence that either Wang-Murao or Ramirez improperly influenced any else to vote in favor in the Union.

ii. The purported pro-union conduct was not widespread or widely known, and does not support a finding of material impact on the election (Factors 2 and 4)

The Employer's repeated overstatement of the two pre-petition meetings attended by Ramirez and Wang-Murao is exhausting. *See supra*. To the contrary, the Regional Director correctly determined that the "relatively isolated" nature of Ramirez' and Wang-Murao's

purported pro-union conduct "weights against finding their conduct affected the outcome of the election." RD Decision at 9-10. And moreover, as the Regional Director rightly points out, and as the Employer tries to overlook, both Wang-Murao and Ramirez disengaged from even their minor Union involvement *after* they attended two meetings and signed authorization cards, and *before* the petition was filed – thus, none of their conduct occurred during the critical period. RD Decision at 10. Even the Employer's trumped up (and unsupported) contentions about the alleged widespread knowledge among the employees of the fact that Wang-Murao and Ramirez attended meetings and signed cards (Request at 17) fails to establish any widespread or lingering influence on employees when it *subsequently* and *weeks before the election* became known that both had disengaged. *See infra*.

Of course, this all assumes that Wang-Murao's and Ramirez' conduct regarding the meetings and authorization cards expressed pro-union sentiment and had any impact. This is also untrue. As articulated *supra* and more fully in Petitioner's Post-Hearing Brief (at 24-25) no one recalled either Wang-Murao or Ramirez as vocal participants at either meeting, let alone saying anything in *support* of the Union. To the contrary, witnesses recalled at best that they just listened. And, neither testified to attending meetings to support the Union campaign. Rather, they went to gather information. Transcript 149:13-19 (Wang-Murao), *id.* at 193:25-194:1, 198:11, 214:5-7 (Ramirez). While it is undisputed that 10-20 employees attended the same union meetings attended by Wang-Murao and Ramirez (*see* Union Ex. 1), there is little evidence that employees were cognizant of their attendance and *no* evidence that either said anything in support of the Union at either meeting.

Nor has the Employer established that it was "widely known among the MeadowView community that both Ramirez and Wang-Murao signed authorization cards." Request at 17.

Although Ramirez testified that "everybody knew" he signed a card, Transcript at 202:10, he also could not recall any conversations about signing a card. Transcript at 203:7-9. Thus, at most, Ramirez *assumed* or *believed* everyone knew he signed a card, but this *proves* nothing. Wang-Murao's testimony, in turn, was only that she thought she *might* have told Oswald and Lara she signed a card, Transcript at 129:4-9, but there is no evidence that even this *potential* knowledge extended further.

Even if there were evidence of widespread knowledge that Wang-Murao and Ramirez signed authorization cards, the Employer has not established why that matters. The Board has repeatedly found the signing of authorization cards – even in front of other employees and among other pro-union conduct – unobjectionable. *See, e.g., Northeast Iowa Telephone Co.*, 346 NLRB 465, 467 (2006).

iii. All of the purported pro-union conduct occurred before the petition was filed, and did not materially impact the election (and also cannot form the basis for an election objection) (Factor 3)

As articulated *supra*, the Regional Director correctly determined that all of the purported pro-union conduct occurred before the filing of the petition, and therefore cannot form the basis for an objection to the election. In a continued effort to blindly ignore this controlling law, the Employer omitted all discussion of this factor from its Request (and Exceptions Brief) despite noting the factor when outlining the applicable *Harborside* standard. *Compare* Request at 6 (listing five *Harborside* factors) *with* Request at 17-29 (including sections (a) through (d) addressing *Harborside* factors 1, 2, 4, and 5, but not 3).

But, even if the pre-petition conduct could form the basis for the Employer's Objection here (it cannot), where both Wang-Murao and Ramirez signed cards and attended meetings far before the election, and before noticeably removing themselves from all Union activity, their later conduct, if anything, would be the impression left on potential voters. This factor lends

further support for the lack of *any* impact on the outcome of the election and in ignoring it, the Employer has offered no basis for reviewing the Regional Director's determination in this regard. *See* RD Decision at 9-10.

iv. The purported pro-union conduct had no lingering effect, and the Employer's purported inability to "disavow" the conduct did not materially impact the election (Factor 5)

The Employer contends that the "lingering effects" of Ramirez and Wang-Murao's conduct lasted "up to the very date of the election." Request at 18. The gist of the Employer's argument is that Ramirez and Wang-Murao never *disavowed* their alleged support for the Union, thus is must have persisted in the minds of the voters weeks later on election day. Request at 18. This misses the point – as noted by the Regional Director, "[w]hile the Employer did not directly disavow Ramirez' and Wang-Murao's rather limited conduct, the nature and extent of involvement did not require direct repudiation to dissipate coercive effects because the conduct was so circumscribed." RD Decision at 10.

Despite the Regional Director's sound reasoning, the Employer continues to bemoan the inability to disavow, perhaps hoping that the Board will overlook the fact that neither Ramirez or Wang-Murao never expressly disavowed their support for the Union because there *was nothing to disavow*. As articulated *supra* and throughout Petitioner's prior briefing, Ramirez and Wang-Murao *tangentially* participated in a few of the Union's early organizing efforts – Wang-Murao was at best "hesitant" about the Union, and Ramirez was in fact *against* the Union. Thus, to suggest that either's conduct (which was not *pro*-union) persisted in the minds of voters *weeks* later to such an extent that these free-thinking, mature adults voted against their conscience and in favor of the Union, is absurd.

The Employer implores that it could "not possibly have addressed Ramirez's and Wang-Murao's conduct" at the daily, mandatory meetings instituted after the petition was filed because

no "managers, supervisors, or leaders in management were ever informed that Ramirez or Wang-Murao attended the union meetings." Request at 19 (citing 100:19-101:2). First, it is telling that this litany of uninformed leadership includes "supervisors" and yet the Employer expended a full-day hearing and three briefs arguing that Ramirez and Wang-Murao were supervisors – of course they knew they attended two meetings each.

Second, once again, the Employer makes allegations unsupported by the testimony cited as support. What Wang-Murao actually said (Transcript at 100:19-101:2) was that "at that point" (after the first meeting she attended) she did *not tell* anyone in management that either she or Ramirez attended the meeting. That Wang-Murao did not *tell* anyone after the first meeting does not mean management did not *know* then, or at some other point prior to the election. Evidently, someone with authority at the Company became aware of this fact with enough time to file the instant Objections. In sum, the "the Employer did not present any evidence on the record that the Employer failed to disavow their behavior because the Employer had no knowledge of their actions." RD Decision at 10 n.10. In re-iterating its prior briefing on this point, the Employer did not claim – and did not provide any evidence – that the Regional Director overlooked anything in this regard. There is accordingly, nothing to review.

It should not go unnoticed, moreover, that even if the Employer did not expressly disavow Ramirez or Wang-Murao's conduct, it certainly made its position with respect to the Union known. As aptly noted by the Regional Director, "[c]onsidering high-level management's daily communication with employees concerning its position regarding unionization and that Wang-Murao and Ramirez ceased to attend union meetings or to engage in any pro-union speech, it was less likely that any employee would presume that Wang-Murao or Ramirez were pro-union at the time of the election, much less that they had conveyed to employees that the

company supported the union." RD Decision at 10. Further, both Ramirez and Wang-Murao attributed their decision to segregate from the Union to a meeting held with the Employer and its parent company shortly after the petition was filed. Transcript at 125:17-126:18 (Wang-Murao); Transcript at 200:23-201:8 (Ramirez). This was known to both of Wang-Murao's testifying supervisees. When Oswald was asked whether Wang-Murao "told [her] that she didn't want to be any – involved any further in the union issue long . . . before the vote" she answered affirmatively, "Before the vote, yes. After she had been told that a manager cannot be part of the meeting." Transcript at 176:4-9 (Oswald); *accord* Transcript at 291:20-24 (Nuanez) (regarding his supervisor Wang-Murao and (and Ramirez) "once they . . . were told that they were management and not allowed to vote, any general conversation between them did not exist at that point. We never spoke of anything about the Union from that point on."). When Ramirez' supervisee, Andrews, was asked whether she got "the impression that [Ramirez] was a supporter of the Union" she answered unambiguously, "No." Transcript at 234:18-20 (Andrews).[10]

Thus, since neither Ramirez nor Wang-Murao ever actively supported the Union, and none of their supervisees thought they supported the Union, it is essentially immaterial whether the Employer was able to disavow their conduct since it did not materially impact the election in favor of the Union. That said, the Employer had ample opportunity – and did in fact – make clear that not only on-site management but also its parent company, were vehemently opposed to the

[10] Further, evidence also suggests that Wang-Murao conveyed at most hesitancy about the Union to her other supervisee, who did not testify at the Hearing, Lara. For example, Wang-Murao testified: "I know I discussed with, like, Rebecca [Lara], kind of my *hesitation* with it. Just, like, still having *uncertainty*." Transcript at 98:15-16 (Wang-Murao) (emphasis added). And after the second meeting, Wang-Murao had a conversation with Lara she described as "an overview of what we were discussing. And kind of, maybe, expressing that we were both really unsure what we wanted to do, but nothing more than - - than that." Transcript at 106:8-11 (Wang-Murao). Similarly, regarding both Lara and Oswald, Wang-Murao testified, "we were all, honestly, kind of *hesitant* about it. But we never really, like tried to persuade each other, or not persuade each other." Transcript at 101:15-17 (emphasis added).

Union. *See* Transcript at 302:19-20 (Nuanez); Transcript at 332:5-7 (Donatello); *see also* Petitioner's Post-Hearing Brief at 29-30.

The Employer's citation to *Harborside* and *SNE Enterprises* (Request at 18-19) are unavailing where here, contrary to *Harborside* and *SNE Enterprises*, there was *no improper supervisory conduct*. That the Board found the employers' anti-Union communications insufficient to overcome the taint of the improper supervisory conduct in those cases does not mean that an employer's anti-union communications will always be insufficient – in fact, as noted by the Employer, in *SNE Enterprises*, the Board noted that "higher management's antiunion stance *can* mitigate a supervisor's pro-union conduct." Request at 18 (quoting 348 NLRB at 1043) (emphasis added). Here, of course, there was no improper supervisory conduct, and moreover, the Employer had ample opportunity to – and did in fact – make known that it was opposed to the Union.

V. EXTRAORDINARY RELIEF IS NOT NECESSARY, AND THE EMPLOYER FAILED TO PROVIDE ANY EVIDENCE TO THE CONTRARY

In a single paragraph, the Employer superficially requests extraordinary relief under 29 CFR § 102.67(j) – specifically, "(1) expedited consideration of its Request for Review, and (2) a stay of the Regional Director's Opinion, including the Certification of Representative contained therein." Request at 3. Although the Employer recognizes that extraordinary relief is granted ***only*** "upon a clear showing that it is necessary under the circumstances," Request at 3; *see also* 29 CFR § 102.67(j)(2), the Employer nonetheless fails to advance *any* evidence of necessity.

Rather, the Employer offers one, conclusory sentence that "such relief is required in order to avoid unduly prejudicing MeadowView, and the voting unit, by certifying election results and requiring bargaining based on a campaign and election unlawfully tainted by repeated and serious supervisory misconduct." Request at 3. As outlined in the foregoing, the Employer failed

to demonstrate that the election was unlawfully tainted, or that there was *any* misconduct, let alone *serious* misconduct, by a *supervisor.* Nor, of course, did the Employer substantiate its contention that it (or the voting unit that voted *in favor* of the Union) would be prejudiced, let alone *unduly* prejudiced, by certification of the representative here. To the contrary, any request for review of a Regional Director's decision on election objections includes to some degree a contention that the election was tainted (by supervisory conduct or otherwise) – thus, this standalone, conclusory proposition is plainly insufficient to establish the need for *extraordinary* relief above and beyond that which may be requested under normal circumstances.

Despite the Employer's failure to establish necessity, Petitioner is not opposed to expedited consideration of the Request for Review. The Employer has dragged its feet long enough by reiterating its failed arguments in lieu of conceding to the fairly and validly expressed desire of a majority of its employees – representation by Petitioner. However, Petitioner opposes the request for a stay, which is not warranted under the circumstances. As the Board has articulated, the "rarity of stays bespeaks our strong belief in the expeditious handling of representation cases." *Pratt Institute*, 339 N.L.R.B. 971 (2003). Certainly, where the Employer has paid no more than "lip service" to its own request for extraordinary relief, there is no basis for granting a stay. Indeed, the Board has denied requests to stay the issuance of the Certification of Representative even in cases presenting unique and unusual circumstances, (far from the Employer's simple distaste for the result here). *Compare, e.g.*, *Saint Martin's University*, (Unpublished), 2016 BL 204868 (2016) (denying request for stay although the Board may lack jurisdiction and the certification may run afoul of the First Amendment).

VI. CONCLUSION

The Employer's Request for Review is nothing more than a transparent attempt to substitute the Employer's soundly rejected arguments for the record evidence. The Regional Director's decision is amply supported by the facts and applicable, well-settled Board law. The Employer failed to provide any compelling reason that the Regional Director's analysis of either fact or law was erroneous, or that any important Board rule or policy warrants reconsideration. Moreover, the Employer has failed to explain why the extraordinary remedy of a stay is warranted under the circumstances. The Employer should not be provided further opportunity to delay and interfere with the soundly expressed desire of its employees to be represented by the Petitioner. Accordingly, Petitioner respectfully requests that the Request for Review and for a stay be denied.

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